SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1454

Supreme Court, U. S.
FILED
JUN 5 1972
MICHAEL RODAK, JR., CLERK

DOLORES BRENNAN and
ANNE E. LONERMAN and
WILLIAM JONES,

Petitioners

v.

GEORGE R. HAINES, et al.,

Respondents

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Does the filling of a vacancy, as required by state law, for an unexpired term on a municipal legislative body by the other legislators of that body who were elected by wards constitute such a substantial question of denial of equal protection of law of electors in the ward from which the legislator who resigned to create the vacancy was elected under the Fourteenth Amendment to the Constitution as to require the convening of a three-judge court under 28 U.S.C. 2281 et seq.?

2. If a circuit court of appeals determines that a district court erred in not convening a three-judge court under 28 U.S.C. 2281 et seq., does the circuit court have the authority to bypass the three-judge court and decide the case on its merits?

STATEMENT OF THE CASE

Brynmor Davis, Jr., who was elected by the fourteen members of the Board of Commissioners to fill Mr. O'Neill's unexpired term as Commissioner of the Eighth Ward, was a resident of the Eighth Ward as the law required (A4).

REASONS FOR REFUSING THE WRIT

1. The Court of Appeals did not err in declining to order the convening of a three-judge court since the case does not involve a substantial federal constitutional question.

The key issue in this case is whether petitioners satisfied the requirement for the convening of a three-judge court that the case involves a substantial federal constitutional question. The law on this point was recently set forth by Chief Judge Phillips of the United States Court of Appeals for the Sixth Circuit in *Jones et al. v. Branigin et al.*, 433 F.2d 576 (6th Cir. 1970) at page 577:

> "The statutes providing for three-judge courts were designed to secure the public interest in a 'limited class of cases of special importance.' *Phillips v. U.S.*, supra, 312 U.S. at 249; *Ex parte Collins*, 277 U.S. 565, 567. These statutes therefore have been strictly construed. *Mitchell v. Donovan*, 398 U.S. 427; *Rosado v. Wyman*, 397 U.S. 397; *Goldstein v. Cox*, 396 U.S. 471, *Phillips v. U.S.*, supra, 312 U.S. 246.
>
> "As said in *Allen v. State Board of Elections*, 393 U.S. 544, 561:
>
> > 'We have long held that congressional enactments providing for the convening of three-judge courts must be strictly construed . . . convening a three-judge court places a burden on our federal court system, and may often result in a delay in a matter needing swift initial adjudication. . . . Thus we have been reluctant to extend the range of cases necessitating the convening of three-judge courts.'
>
> "In *Swift & Co. v. Wickham*, 382 U.S. 111, 115, the Supreme Court said: 'It has long been held that no such court is called for when the alleged constitutional claim is insubstantial.' To like effect see *Booker*

v. State of Tennessee Board of Education, 240 F.2d 689, 691 (6th Cir.), motion for leave to file petition for writ of mandamus denied, 351 U.S. 948.

"In *Ex parte Poresky*, 290 U.S. 30, 31, the Supreme Court said that 'a substantial claim of unconstitutionality' is necessary for the convening of a three-judge court, and that the statute 'does not require three judges to pass upon this initial question of jurisdiction.'"

To determine whether there has been such a substantial claim of unconstitutionality, it is necessary to examine the allegations of the complaint in question. In their complaint the petitioners claim that they have been denied the equal protection of the law under the Fourteenth Amendment because none of the commissioners who appointed Mr. Davis to fill the vacancy were residents of the 8th Ward and because the petitioners who are residents of the 8th Ward had not been able to participate in the election of any of them. The case relied upon by petitioners is *Avery v. Midland County*, 390 U.S. 474 (1968). Mr. Justice White in the opinion for the Court in that case stated at pages 484-485:

"The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. The conclusion of *Reynolds v. Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

"This Court is aware of the immense pressures facing units of local government, and of the greatly

varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors v. Board of Education*, 387 US 105, 18 L Ed 2d 650, 87 S Ct 1549 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch v. Davis*, 387 US 112, 18 L Ed 2d 656, 87 S Ct 1554 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population."

Oregon v. Mitchell, 400 U.S. 112 (1970), was a landmark decision of the Court in voting cases. In that case the Supreme Court by a 5-to-4 decision determined that the Voting Rights Act Amendments of 1970, which were enacted by Congress, were unconstitutional insofar as Congress attempted to lower the voting age to 18 for voters in state and local elections. Mr. Justice Black, who also voted with the majority in approving the validity of the act insofar as it lowered the age for voters to 18 in federal elections, stated at page 124:

"On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution in-

> tended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. My major disagreement with my Brother Harlan is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and *the nature of their own machinery for filling local public offices.*" (Emphasis supplied)

Mr. Justice Stewart, with whom Chief Justice Burger and Mr. Justice Blackmun joined, concurring in part and dissenting in part, stated at pages 293-4:

> "Mr. Justice Black is surely correct when he writes, 'It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.' *Ante* at 125."

It is necessary then to determine whether the residents of Ward 8 have some inherent right to be represented by a commissioner whom they elect. It is very clear that the petitioners have cited no basis for such right in Pennsylvania law. It is also very clear that the petitioners and other electors of Ward 8 have no inherent right to hold an election. The law on this subject is well summarized in 29 C.J.S. *Elections* §66:

"In all popular forms of government the power of a majority to bind the minority by a popular vote depends on the fact that the elections are held by virtue of some legal authority. There is no inherent right or power in the people to hold an election, and the system of elections in this country is not of common-law origin, since it was unknown to the common law.

"The right or power to hold an election must be based on authority conferred by law, and an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is universally recognized as being a nullity, even though it is fairly and honestly conducted. . . .

"The authority to hold an election is legislative and political. The legislature may provide for elections, both general and special, as long as they do not conflict with constitutional requirements, and, except in so far as constitutional provision is made for an election, the legislature alone has authority to provide for an election."

Several recent decisions by federal courts have emphasized the fact that the right to vote in state elections is a privilege granted by the state. As the court stated in *Fontham v. McKeithen*, 336 F.Supp. 153 (E.D. Louisiana, 1971), at page 155:

"[2] The underlying concept in this case is that a resident of a State does not have a *right* to vote in State elections; there is no inherent right to vote, but a *privilege* to vote, which privilege is granted by the State and is not derived from citizenship of the United States, nor granted by the federal Constitution or any of its Amendments. Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627 (1875)."

Similarly, the court stated in a Per Curiam opinion in *Pate v. El Paso County, Texas*, 337 F.Supp. 95 (W.D. Texas, 1970), at page 97:

"The right to vote is a privilege to be exercised as the state may direct, and upon such terms as may seem proper to the state, provided there is no discrimination between individuals in violation of the equal protection afforded by the United States Constitution. As long as standards and conditions regarding voting are reasonable and non-discriminatory they are permissible. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)."

The argument is made by petitioners that since they were given the right to vote for their commissioner, they have the right to vote to fill his vacancy. As we have seen, such is not the case unless the legislature saw fit to give them such right, which it has not done.

The same procedure for filling vacancies applies to all first class townships in the Commonwealth. The commissioner elected from petitioners' ward had the same right to participate in the appointment of a commissioner to fill an unexpired term for any other ward as the other commissioners had to fill the vacancy in question. The relationship between the ward and the municipality was clearly explained in a case involving a similar procedure which was decided by the Supreme Court of Errors of Connecticut in *State v. Waterman*, 111 A. 623 (1920), in which the Court stated at page 624:

"[1] For the purposes of candidacy and election an alderman elected from a single ward may be described as a ward officer or ward alderman; but after election and in the exercise of his office a ward alderman is as much a city officer as is an alderman at large. The wards have no separate legislative powers. In their relation to the court of common council they are but election districts. The common council consists of city officers in the same sense that

our Senate consists of state officers, though elected from senatorial districts."

The court went on to point out that to permit the municipal legislative body to fill the vacancy of a legislator elected from a single ward would not violate the principles of representative government at pages 624-625:

> "[2] The argument seems to be that, because the General Assembly cannot fill vacancies in its own ranks by resolution, it cannot authorize the legislative body of a chartered municipal corporation to do so. This is a non sequitur. The authority which creates an office may direct how any vacancies therein shall be filled. The General Assembly cannot fill vacancies in the House or Senate, because the offices of Senator and Representative were created by the people in convention assembled; and that authority has not granted to the General Assembly any power of filling vacancies in its ranks, except in the case of a tie vote. On the other hand, the office of alderman from the Sixth ward of the city of Hartford as well as the privilege of voting for such an alderman, was created by the General Assembly, which may therefore direct any vacancy therein to be filled by the court of common council without depriving the electors of the Sixth ward of any constitutional or fundamental right."

The Supreme Court ot the United States has recognized that the states may work out practical procedures short of requiring that once a state gives the electorate the right to vote for a particular office, it must always do so every time that office is to be filled. In *Fortson v. Morris*, 385 U.S. 231 (1966), the Supreme Court approved a provision of the Georgia Constitution that if no candidate for governor received a majority of votes in a general election, then the Georgia Legislature should elect the governor from the two persons having the highest number of votes.

In the instant case the filling of the vacancy runs for a limited time, namely, three and one-half years. In no case

could it run for more than four years, which is the term of office: Act of May 27, 1955, P. L. 1955, Section 12, 53 P.S. §55504. The fact that the Supreme Court recognizes that the Equal Protection Clause cannot practicably be applied on a continuing basis was shown by Chief Justice Warren in the Court's opinion in *Reynolds v. Sims*, 377 U.S. 533 (1964) at pages 583-584:

> "In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation."

Several recent federal decisions have held that the denial of the right to vote for periods of six years' duration did not offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In *Ferrell v. State of Oklahoma ex rel. Hall*, 339 F.Supp. 73 (W.D. Oklahoma, 1972), at page 82 the court stated:

> "Plaintiffs claim that it is invidiously discriminatory for the State Legislature to provide that citizens living in certain geographic areas of the State of Oklahoma, who last voted for a Senator in 1968, and who will next vote for a Senator in 1974, is untenable. During the two year transitional period in changing from the court-ordered apportionment plan of 1964 to the constitutional apportionment plan of 1972, such situations are unavoidable if four year overlapping terms are to be provided as required by the State Constitution—and to do so does not offend the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Stout v. Bottorff, 249 F.Supp. 488 (D.C. Ind. 1965); Rey-

nolds v. State Election Board, 233 F.Supp. 323 (W.D. Okl. 1964)."

Similarly, in *Pate v. El Paso County, Texas*, supra, the court held that a provision of the Texas Constitution establishing staggered terms for county commissioners did not effectuate unconstitutional denial of right to vote in violation of equal protection and due process requirements of the United States Constitution, either on its face or as applied to voters who would have been entitled to vote for county commissioner at the next election but who, because of redistricting, were transferred to districts in which they would not be entitled to vote for county commissioner until the second following election.

An analogous case to the case in question is *Anderson v. Meisser*, 285 F.Supp. 974 (E.D. New York 1968). In that case plaintiff urged that it was a violation of the right of "one-man, one-vote" of persons in one of a number of districts within a county to permit a county-wide committee to determine who can run for office in the district. The court recognized that the standards of the Equal Protection Clause apply to party primaries as well as to general elections. The court then went on to state at pages 975-976:

> "We need not now decide whether greater leeway in departing from equivalence of voting power is permitted in party contests, for the Supreme Court has refused to expand the rule of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) to outlaw the subtle attenuation of equality involved in cases such as this. See, e.g., *Dusch v. Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967) (voters from entire city elected candidates required to live in districts of unequal population); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965) (multi-member and single member districts). While members of a party living outside the voting district are granted some control over candidates

> within the district, party members within the district exercise power in districts other than their own. Thus the loss of a single party member's influence in his district by diffusion of power over the larger area of a county is at least partly offset by the increased sway he gains in other districts. The Constitution does not require that these gains and losses offset each other with the mathematical nicety of an accountant's balance sheet. But cf. Banzhaf III, *Multimember Electoral Districts—Do They Violate the 'One Man, One Vote' Principle*, 75 YALE L.J. 1309 (1966). The federal question raised by plaintiff is frivolous."

This is very similar to the case in question. When the voters of Ward 8 voted for the commissioner from their ward, they were given powers beyond their ward because their commissioner became a commissioner of the entire township and he thereby had the right to participate in the appointment of any commissioner to fill any vacancy from any other ward. The fact that the commissioner from Ward 8 later resigned his office was happenstance.

The cases cited by petitioners in their petition in support of the proposition that this case presents a substantial constitutional question are easily distinguishable. One case does not involve voters' rights at all. In every other case cited by petitioners the state statute or constitution in question authorized the election about which the plaintiff was complaining except *Kaelin v. Warden*, 334 F.Supp. 598 (E.D. Pa. 1971), and it should be noted that the United States Court of Appeals for the Third Circuit relied heavily on *Kaelin v. Warden*, 334 F.Supp. 602 (E.D. Pa. 1971) in affirming the lower court's decision in this case to deny petitioners' request for the convening of a three-judge court.

We can see then that the petitioners have not established that there is a substantial federal question involved in this case. The law is now clear that the states have the

power to determine "the nature of their machinery for filling local public offices" *Oregon v. Mitchell*, supra. The only claimed basis for federal jurisdiction in this case is the Equal Protection Clause of the Fourteenth Amendment. Since there is no inherent right to vote to fill the vacancy in the office of township commissioner, the petitioners cannot complain to the federal government if the state does not so provide. Further, the commissioner petitioners had an opportunity to vote for when elected had the same opportunity to participate in the filling of any other vacancy in the office of township commissioner as the other commissioners did in the case of his vacancy.

2. If this Court determines that a three-judge court should have been empaneled, it cannot bypass that procedure.

Petitioners contend that the Court of Appeals erred in not deciding this case on the merits. No authority for this proposition of law is cited and indeed none can be because there is no such authority. The main thrust of petitioners' argument is that since the next election for commissioner from the Eighth Ward is scheduled for November, 1973, petitioners' case will become moot if it is not now decided on the merits. This is inherent in petitioners' case and indeed is one indication of the fact that no substantial federal constitutional question is involved in this matter.

Regardless of the passage of time even if the Court of Appeals had determined that a three-judge court should have been empaneled by the District Court, the Court of Appeals had no authority to decide the case on its merits.

As the court said in *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) at 715-716 in a Per Curiam opinion:

> "In the Stratton Case[1] it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges."

1. *Stratton v. St. Louis S. W. R. Co.*, 282 US 10 (1930).

The Per Curiam opinion of the U. S. Court of Appeals for the Fifth Circuit in *Gong v. Kirk*, 375 F.2d 729 (5th Cir. 1967) which was cited by petitioners on page 9 of their petition, recognized this principle.

The authority for the issuance of an injunction against enforcement of a state statute on the ground that it is unconstitutional is statutory as set forth in 28 U.S.C. §2281, which requires a hearing and a determination by a district court of three judges. Accordingly, even if this Court were to decide that petitioners had presented a case which involved a substantial federal constitutional question, the only authority this court would have would be to direct the District Court to convene a three-judge court. There is no authority for the Circuit Court of Appeals to decide such a case on its merits. Similarly, there is no authority for this court to decide such a case on its merits in the first instance unless, of course, this Court otherwise had original jurisdiction of the case which is not true of the present case.

CONCLUSION

Petitioners have not shown that a substantial constitutional question is involved in their challenge of the constitutionality of the state statute governing the filling of a vacancy on the board of commissioners of a first class township. Therefore, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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